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No. 877

Office-Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1961

IN THE MATTER

OF

The Application of ROBERT E. FISCHER, Special Assistant Attorney General, for an Order revoking and/or modifying, etc., the sentence of HELEN DAVIS, also known as MAE THOMAS CRASKA, of July 14, 1959, in accordance with Sections 470-a and 935 of the Code of Criminal Procedure.

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

HELEN CRASKA, also known as HELEN DAVIS,

Appellant.

JURISDICTIONAL STATEMENT

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Supreme Court of the United States

October Term, 1961

No.

IN THE MATTER
OF
The Application of Robert E. Fischer, Special Assistant Attorney General, for an Order revoking and/or modifying, etc., the sentence of Helen Davis, also known as Mae Thomas Craska, of July 14, 1959, in accordance with Sections 470-a and 935 of the Code of Criminal Procedure.

PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

HELEN CRASKA (also known as HELEN DAVIS),
Appellant.

JURISDICTIONAL STATEMENT

(a) Opinions Below

The Court of original jurisdiction wrote no opinion. But its findings is embodied in the decision of the record on appeal which is made a part of this application. (See fols. 315 through 327.) The Applellate Division unanimously affirmed without opinion on December 1st, 1960. Thereafter, the appellant applied to Stanley H. Fuld, Associate Judge of the Court of Appeals of the State of New York for permission to appeal and said permission was denied, by order of said Judge Stanley H. Fuld, on December 30th, 1960. Thereafter, said Judge Stanley H. Fuld signed an order dated January 5th, 1961 in which, among other things, he incorporated the fact that the appellant argued in the record and proceedings below that there were violations of rights guaranteed by the United States Constitution. A copy of the appellate division Judgment and the two orders of Judge Stanley H. Fuld are attached hereto and marked respectfully, Exhibits "A", "B" and "C."

(b) Grounds of Jurisdiction

(i) This proceeding was instituted by order to show cause brought by the special prosecutor, Robert E. Fischer, in accordance with Section 470-a and 935 of the Code of Criminal Procedure. Copies of both statutes are annexed hereto and are marked Exhibit "D" and "E" respectfully.

(ii) The final order of Judge Stanley H. Fuld of the Court of Appeals of the State of New York was made and entered January 5th, 1961. No application was made for a rehearing. Notice of appeal was filed on January 10th, 1961 with the Clerk of the County of Oneida, with whom all papers in this proceedings have been filed.

(iii) The jurisdiction of this Court is invoked under 28 United States Code, Section 1257 (2).

(iv) Cases believed to sustain the jurisdiction are:

Young vs. California, 308 U.S. 147;
Kunz vs. New York, 340 U.S. 290;
Adler vs. Board of Education, 342 U.S. 485;
Slochower vs. Board of Higher Education, 350 U.S. 551

(v) Section 813-a of the Code of Criminal Procedure of New York is the chief statute involved in this appeal and is set forth verbatim in the Exhibit "F." There is also involved Article I, Section 12 of the New York State Constitution set out herein and marked Exhibit "G."

(c) Question Presented

1. Article I, Section 12 of the New York State Constitution protects the right of the People of New York against unreasonable interception of telephone and telelgraph communications, but permits certain exceptions. Section 813-a of the Code of Crimminal Procedure is the statute enabling such exceptions. Are these laws unconstitutional in that they violate Article VI of the United States Constitution (the supremacy clause thereof) as well as Amendment VI, prohibiting unreasonable searches and seizures, Amendment V, prohibiting self incrimination and Amendment XIV, prohibiting a deprivation of liberty without due process of law?

2. Was the hearing of August 14th, 1960 done with precipitate hast and did it violate the defendant's rights under Amendment XIV of the United States Constitution?

3. Can the defendant be jailed summarily and does such jailing violate her rights under Amendments IV, V, VI, VIII and XIV of the United States Constitution.

4. The foregoing questions although not certified by the Court of Appeals is presented as outlined in the notices of appeal.

(d) Statement of the Case

The appellant (fol. 90) pleaded guilty to a misdeameanor (fol. 39) a violation of Section 1146 of the Penal Law on July 14, 1959 (fol. 31) and was sentenced on that day by the Hon. Justice John S. March, to one year in the Oneida County Jail, suspending the execution thereof "during her good behavior and further fining her the sum of Five Hundred Dollars,)$500.00) (fol. 41), a part of the consideration for said suspension of sentence being the appellant's state of health (fols. 34, 35 and 40). The defendant concededly paid the Five Hundred Dollars $500.-00) fine imposed (fol. 57).

Thereafter, the appellant was subpoenaed to appear before the additional Grand Jury sitting for the Extraordinary Special and Trial Term of the Supreme Court held in and for the County of Oneida, on March 29, 1960 (fol. 33 et seq.) and again on March 31 (fols. 62 and 63), and did appear and testify before said tribunal and on said dates, testifying at length to questions put to her after being granted immunity, in accordance with Section 2447 of the Penal Law (fol. 338) of New York, a copy of which is annexed and marked Exhibit "I."

Thereafter, the appellant was ordered to show cause why an order should not be made revoking the July 14, 1959, order which suspended execution of the appellant's sentence and further why an order should not be made for execution and imposition of said one-year sentence, forthwith pursuant to Sections

470-a and 935 of the Code of Criminal Procedure (fols. 46-51) based upon an affidavit of the Special Assistant Attorney General, Robert E. Fisher, alleging the appellant had a preconceived intention to evade the questions of the Grand Jury (fol. 60), and that her answers before said body were "incredible and untruthful on their face, inconsistent and contradictory" and that she undertook "contemptuous and perjurious conduct before that body" (fol. 62).

Appellant answered that the procedure violated her rights under the Federal and State Constitutions (fols. 80-81) and that her answers were responsive (fols. 70-72) and that the only remedy, if any, was indicated, was by way of contempt or indictment for perjury (fol. 86) and included in her answer an affidavit of her attending physician showing the deterioration in her health (fols. 95-99).

On April 14, 1960, a hearing was held before the Hon. Justice John S. Marsh on the order to show cause (fol. 100 et seq.) in which counsel for appellant was given a transcript of the Grand Jury minutes of March 29, and a transcript of an alleged telephone intercept (fol. 108). It was on these two documents alone that the prosecutor relied (fol. 109) although there was a subsequent hearing on March 31, in which appellant testified (fols. 62-63) before the same Grand Jury. These documents were handed to appellant's attorney for the first time on the same day of the April 14, 1960 hearing (fol. 108).

In his opening statement the prosecutor outlined what he deemed objectionable to appellant's answers (fols. 118-120) and stated that the appellant's telephone line was tapped and a conversation intercepted which allegedly gave rise to appellant's intent to evade questioning (fols. 121-213) and stating that it was his choice to proceed against the appellant by this means rather than perjury or contempt (fol. 132), although he told the appellant she had immunity from any penalty except perjury or contempt (fols. 341 and 342).

Appellant's attorney stated that the proper remedy was only perjury or contempt (fol. 134), that any telephone intercept violated the Federal Communication Act (fol. 141), that her answers in any event are plausible (fol. 138).

The appellant, through her attorney, offered to go back to the Grand Jury or to the Court and explain the meaning of her testimony or testify over (fol. 138), but that offer was ignored.

Appellant also objected under the 4th, 5th, 6th, 8th and 14th Amendments of the Federal Constitution as well as the comparable provisions of the New York State Constitution (fols. 151-153).

The Court saw the Grand Jury minutes for the first time at this hearing (fol. 161), although stating he "glanced" at it, and the prosecutor indicated that the entire testimony must be read in order to see the alleged misbehavior (fol. 165). A recess was taken so that the prosecutor could outline for defense counsel what he thought objectionable, (fols. 168-171). The recess was short and the prosecutor, already familiar with the record, delineated certain points which he outlined to the Court, but again stated that "only way is to go through and analyze all of them" (fol. 197).

The prosecutor then introduced a telephone billing card for one Raymond D. Edge (fols. 214 and 253), but is was never clearly shown by this record that the number tapped was used by the appellant.

Defense counsel objected to the introduction of any evidence that related to the telephone intercept on the grounds that it violated the Federal Communication Act (fol. 217). One witness only identified the voice of the appellant (fol. 241) and he talked to the appellant twice; once for "three or four minutes" in December of 1958 (fol. 295), and again on March 24, 1960, for the same length of time, when he served a subpoena (fol. 296). He admitted there were five people whose voices were

recorded on Exhibit 4 (fols. 290-291) and admitted that the voices were "garbled" as the Court heard them (fol. 291). The conversation itself concedes that one of the participants was "drunk" (fol: 260).

Thereafter, the prosecutor rested (fol. 298) and the attorney for the appellant again offered to have the appellant answer the questions (fol. 305) and this second request was also ignored.

Whereupon the Court immediately (fol. 328) rendered a decision (fol. 315) in which he made only passing reference to the Grand Jury minutes of April 14, 1960 (fol. 324), made a finding that her behavior has not been good, revoked the suspension of execution of sentence and ordered her committed to Oneida County Jail for one year.

Thereafter, an appeal to Appellate Division, Fourth Department, State of New York was filed and a motion made for a certificate of reasonable doubt, at the same time a writ of habeas corpus issued, but by stipulation the writ was withdrawn (fols. 475-480). The certificate of reasonable doubt was granted (fol. 487 et seq.).

The appellate division unanimously affirmed without opinion on December 1st, 1960, and is reported at 12 A.D. 2nd 723 (17) N.Y.S. Official Reports).

The defendant then made application to Judge Stanley H. Fuld, Associate Judge of the Court of Appeals of the State of New York, for permission to appeal pursuant to Section 520 of the Code of Crimminal Procedure of the State of New York and upon the record and procedings herein, said permission to appeal was denied. See Exhibits "C" and "D". Thereafter, upon a motion for a stay pending appeal to this court the said Stanley H. Fuld, signed an order which stated, among other things, that the defendant argued in the record and proceedings below that there were violation of rights guaranteed by the United States

Constitution. This later order was dated January 5th, 1961 and is attached hereto and marked Exhibit "D".

On January 4th, 1961, a notice of appeal to the Supreme Court of the United States was filed with the Oneida County Clerk's Office who is possessed of the record and thereafter on January 10th, 1961 a supplemental notice of appeal, which corrected typographical errors was also filed, but served on January 11th, 1961 on the opposing counsel.

How Issues Raised In State Court

All of the above numbered issues were raised during the hearing in the original court, and were also raised in the Appellant's Brief, used both in the Appellate Division and before Judge Stanley H. Fuld, except that the constitutionality of the wiretap statutes were raised before Judge Fuld.

THE FEDERAL QUESTIONS RAISED ARE SUBSTANTIAL ONES (OR IF A WRIT OF CERTIORARI SHOULD ISSUE THE REASONS ARE OUTLINED BELOW)

BRIEF OF QUESTIONS PRESENTED

POINT I.

The telephone intercept and devulgence violated section 605 of the Federal Communications act as well as section 501 of the same act and in addition violated the appellant's rights under amendment IV, VI, and XIV of the United States Constitution and that article I, section 12 of the New York State Constitution, which authorizes wire taping as well as 813-a of the Code of Crimminal Procedure of the State of New York, are repugnant to the above mentioned amendments of the United States Constitution as well as article 6 of the United States Constitution.

(A) Wire tapping violates the Fourth Amendment of the United States Constitution. The leading case seems to be *Olmstead agdinst the United States*, (1928) 277 U.S. 438; 19 Fed. 2nd, 824 (1927).

There, the Supreme Court, by a divided court decided that neither the Fourth nor Fifth Amendments was violated on the grounds that there was no trespass and that the defendant (in that case) intended his voice to leave the confines of his room and that neither the defendant's person or tangible property were seized. The importance of the *Olmstead* case was that is was effective in establishing legislative control of wire tapping. After that case, and perhaps in direct response to it, Congress in 1934 passed the Federal Communication Act which contained Section 605 and 501.

Since 32 years have passed, and because of the technological improvement of listening devices, and by virtue of the fact that the telephone is now a very common device compared to 1928, then the appellant states that the questions presented as to the Fourth Amendment in the *Olmstead* case should be reviewed again.

There is no doubt that a telephone line is an extension of a person's home. It can be no different than a large estate where a trespass on any part of such estate can be considered a violation of the Fourth Amendment. Since the enactment of the Federal Statutes, the *Olmstead* case no longer applies.

In the case of *People vs. Irvine*, 347 U.S. 128 (1954) the Supreme Court considered it an unreasonable search and seizure when the police entered and installed a microphone in the defendant's premises.

(B) The interception of a telephone line and its devulgence also violated the appellant's rights under the Fifth Amendment, especially the provision against self-incrimination or deprivation of liberty without due process of law. A point that has hardly been raised in the review of the cases is the fact that words and phrases when used over a mechanical intrument are necessarily out of context. A telephone "manner" is different from the manner used speaking face to face. Voice inflections and tones are different since one speaks without the benefit of seeing the effect of his words, upon the facial expressions of the receiver. This is different than an admission made at the scene of a crime which can be considered a part of the res gestae. It is also different from the confession obtained in the presence of police officials when all are face to face. It is even different from a lecturer facing an audience. For example, it might be very simple to exaggerate over the telephone yet very difficult when face to face. An insurance salesman is not nearly so effective over the telephone as he is personally with a prospective client, neither is an attorney, nor a doctor nor, for that matter, anyone else. Why should every inuendo every microscopic difference in meaning be explained in a cold court of law? Why should a bashful person, for example, who is a lot more brazen over the telephone, be required to explain the difference in his approach when he is speaking into a mechanical telephone. The instant case is a fine example. The appellant here was aroused out of her sleep late at night by the telephone ringing. (fol. 258). She is a sick woman seventy years of age (fol. 98). and there were admittedly five participants on the other end of the

line, all apparently having a party, some of whom had been drinking rather heavily, (fol. 260). There was a polite conversation and the five people on the other end of the line who were never fully identified (fol. 254) called to cheer her up, (fol. 259). She did not ask to receive the call, was obviously in no mood to converse at length (fol. 268) and during the course of these conversations announced her impending appearance before the Grand Jury (fol. 275) and that she knew "nothing" (fol. 277). In the first place, it was not the concern nor business of the people who called her what she intended to do, and in the second place her very testimony before the Grand Jury is the best evidence of what her intent was and not the telephone conversation. How the phrases she used in that conversation can possibly be used as an admission, as it was so strainfully construed here, is beyond belief. Although the *Olmstead* case mentioned above covered the Fifth Amendment it is not discussed fully since the majority held that violation of the Fifth depended upon whether or not the Fourth was violated.

It must be remembered that the year after the *Olmstead* decision the Director of the F. B. I. and the then Attorney General, and other administrators went on record before Congressional hearings, as being opposed to wire tapping. See "The Eavesdroppers" Rutgers University Press, 1959, (Part III—Knowlton and Schwartz).

(C) The defendant's rights under the Fourteenth Amendment have been violated by virtue of violation of the Fourth and Fifth Amendments as outlined above.

(D) It is obvious that Congress passed Section 605 after the *Olmstead* case mentioned above and in direct response to that decision. Blackstone observed,

> "*Eavesdroppers, or such as listen under walls or windows or the eaves of a house, to hark after discourse, and thereupon to frame slanderous and mischievous tales are a common nuisance and are punishable at the court-leet; or are indictable at the sessions and punishable by finding surities for their good behavior.*" Blackstone (4 *Commentaries*, Chapter 13, Section 5, Sub-paragraph 6).

There is a very logical reason for the unpopularity of any eavesdropper, whether one defined in Blackstone above or one who taps a telephone line. An eavesdropper does not participate in a conversation and neither is his presence known. It is not the surreptitiousness that is objectionable as much as the fact that simple conversations are made public and must be explained. The argument that one should not object if he has nothing to hide is a hollow one, otherwise, there should be no objection to making any conversation public, such as those between attorney and client, physician and patient and minister and parishioner. Section 605 makes it illegal not only to intercept, but to divulge and "use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto."

(I) As to intra-state control;

It has been decided that the scope of section 605 includes intra state as well as interstate telephone lines. *Weiss vs. United States* 300 U. S. 321 (1939)

A given telephone line can carry both interstate and intrastate calls. In any event, how could there be any federal control over a telephone line when such control can be excluded at any point. The Federal Government can not possibly control a line, say from New York to San Francisco and exclude therefrom control by all the states between New York and San Francisco. It would result in no control at all.

(II) As to Consent:

There is no question here of consent of either party in the instant case, impliedly or otherwise. There was no consent on the part of any one participating in the call.

(III) As to enforcement: In *Schwartz against Texas*, 344 U. S. 199 (1952)

Justice Minton writing for the majority at Page 201 made the flat statement, "Enforcement of the statutory prohibition in Section 605 can be achieved under the penal provisions of Section 501."

The attorney general, after the *Olmstead* Case, was opposed to the tapping of any telephone lines. Attorney General Jackson wrote to the Judiciary Committee of Congress his views that lawful wire tapping required legislative amendment of the section. See Helfeld, "*A Study of Justice Department Policies on Wire Tapping*" (9 Law Guild Review, 57, 60 (1949) anr most recently, if I may be permitted to quote *Look Magazine*, dated March 28th, 1961, at Page 21 and 25, in response to the following question:

"While wire taps are not permitted as evidence in Federal Courts, some officials have pressed

for new legislation to allow their use. What is your position as Attorney General?

Mr.Robert Kennedy allegedly replied. (and I use the word "allegedly" as it is a magazine article) as follows:

"We are studying this question carefully. No conclusions have been reached. If such legislation were passed, my feeling is that the use of legal wire taps should be limited to major crimes such as treason, kidnapping and murder. In each instance, however, it should only be done with the authority of aFederal Judge. We would still have to request permission for a wiretap, exactly as we must do to get a search warrant. At the same time, there is a great deal of indiscriminate wire tapping that now goes unpunished. Therefore, it is essential that the penalty for indiscriminate wire tapping be greatly stiffened. THIS GOES FOR ANYBODY, INCLUDING LAW ENFORCEMENT OFFICERS (emphasis supplied). One of the great problems we have is the language of the law as it now stands. It states that we shall not intercept and disclose messages. Does this mean that we can go ahead and intercept as long as we don't disclose the contents as evidence? Some Courts have said yes to this interpretation. I also fully recognize that legalized wire tapping is a two edge sword that requires the most scrupulous use. For that reason, I would not be in favor of its use under ANY CIRCUMSTANCES, — even with the court's permission — except in certain capital offenses (emphasis supplied)..

At the hearing before the *Sub-Committee on Constitutional Rights of the Committee on the Judiciary*, [redacted] (Number 43495) *dated December 15 and 16, 1959* [redacted] *United States Senate, 86th Congress, First Session*, Mr. Harris Steinberg, a witness before that said committee made the following cogent comment at Page 1508.

> "I believe very firmly that to use degrading methods and lawless methods in the prosecution of criminal cases, degrades the Government."

Senator Hennings, at Page 1511 made the comment that he was a felony prosecutor in charge of trials in the metropolitan area of St. Louis from 1929 through 1934 and that he convicted "70, 80 or 85%" of those indicted. These convictions were obtained without tapping a telephone line.

Mr. Harris Steinberg, again, at Page 1509, made this comment, that the United States Attorney for the Southern District of New York, when publishing the cases he won and lost did just as well as the District Attorney of New York County across the street, yet the District Attorney of New York County had available to him wire tapping, but the United States Attorney at Foley Square could not use wire tapping. The purpose of this citation is to illustrate the boogyman cloak that has been placed over the "necessity" of taping telephone lines.

> In the case of *Binanti vs. United States*, 355 U. S. 96, (1957) this court unanimously held that an interception and divulgence by a New York Law Enforcement Officer was a Federal crime in spite of the order of a New York Court.

While on this subject, there is at least one New York State Justice who has refused to sign an order for the taping of a telephone line.

In the Matter of the Interception of Telephone Communication Anonymous 207 Misc. Report (New York Official Reports) 69, Mr. Justice Hofstadter said at page 74:

"The telephone is in such general use that it is truly a part of our every day life. It is a ready vehicle of communication for people of every station and everything of mutual human concern, whatever its nature, passes over its wires. Interference with its privacy is a direct assault on liberty, and the maintenance of an interception differs in no substantial sense from stationing the police officer at the elbow of the person using the telephone to record what he says.

A telephone interception is a far more devastating measure than any search warrant. A search warrant is confined to a definite place of specific items or, at least, to items of a stated class or description. Those in possession of the searched premises know the search is going on and, when the officer has completed his search, whether it is successful or not, he departs. Not so, in the case of a telephone interception. The interception order is obtained ex parte and the party whose line is to be tapped is, of course, in ignorance of the fact. The tap is maintained continuously day and night. Everything said over the line is heard, however foreign to the stated objective of the law enforcement officers. The most intimate conversations, personal, social, professional, business or even confidential, of a limited number of

persons may be laid bare. In effect, the line of everyone who is called from or makes a call to the tapped line at any time is being tapped during the maintenance of the tap. When a line in a public telephone booth is tapped, as has on occasion been done, the conversation of people having no relation of any kind to the operator of the place in which the booth is situated or the person whose line is tapped, are overheard. It is little wonder that Justice Brandeis was moved to say in the *Olmstead case* — "As a means of espionage, writs of assistance in general, warrants are but puny instruments of tyranny and oppression when compared to wire tapping." (277 U. S. 438, 476)

As a matter of fact, the appellant, through her attorney, has reported this violation of Section 605 and 501 of the Federal Communications Act to the United States Attorney for the Northern District of New York. The letter of transmittal to the United States Attorney called his attention to the fact that this violation appeared in the record which was sent to him. See Exhibit "H" attached hereto. The United States Attorney replied very recently that he had forwarded the papers to the attention of the Attorney General at Washington, D. C. See Exhibit "I." As of the moment of the writing of this brief, nothing has been done on this matter. If the Supreme Court will not reverse a conviction obtained in a state court by virtue of *Schwartz vs. Texas* (344 U. S. 199 (1952), will not permit Federal Court from enjoining a state official from the use of wire tap evidence (*Pugach vs. Dollinger*, decided March 1961) all that remains is enforcement of the law. As of the moment even enforcement can not be obtained, therefore, in effect, these

sections of the Federal Communications Act are of no use as far as state officials are concerned.

(V) As to whether or not a violation of the Section constitutes an exclusionary rule as far as evidence is concerned.

This court has held that as far as states that admit illegally obtained evidence, they will not upset such conviction. See *Schwartz against Texas*, 344, U. S. 199 (1952). However, this exclusionary rule is not the rule in federal cases. In *Nardone against the United States*, 302, U. S. 379 (1937), this court has held that federal agents could not testify to conversations which they had intercepted and the fact that the Federal Government claimed sovereignty was turned down. There was also a Legislative history purporting to show that this statute did not mean to establish an evidentiary rule. See also Westin, "*The Wire Tapping Problem, An Analysis and a Legislative Proposal*," 52 Columbia Law Review, 65, 174 through 175 (1952).

In this case, excluding such evidence had the effect of destroying the incentive of law enforcement officers to permit the violations in the future. See *Judicial Control of Illegal Search and Seizure*," 58 Yale Law Journal, 144, (1948).

In the second *Nardone Case*, 308 U. S. 338 (1939) it was then claimed that the evidence used was discovered through leads obtained by wire tap- was no divulgence in the courtroom. This court rejected that stand and held that such evidence was inadmissable. There the court also used an analogy to search and seizure.

After all, the state judge in the instant case as well as the state prosecutor, both swore to uphold the Constitution and Laws of the United States as well as the Constitution and Laws of the State of New York. Article 6, Clause 2 of the United States Constitution states that the laws of the United States shall be the Supreme Law of the Land and the Judges in every state shall be bound thereby. The appellant feels the time has come to exclude such evidence under the IV, V, and XIV Amendments of the United Stats Constitution.

AS TO POINT II.

The hearing of August 14, 1960 was done with precipitate haste and it violated the defendant's rights under amendment XIV of the United States Constitution.

The Hearing of August 14th, 1960, was done with precipitate haste and violated the defendant's rights under Amendment Fourteenth of the United States Constitution as well as Article I, Section 6 of the New York State Constitution.

Mr. Justice Marsh saw the Grand Jury minutes for the first time as this hearing got under way (fol. 161) even though the prosecutor indicated that the entire testimony must be read in order to see the alleged misbehavior (fol. 165). the only time the Court could have read the minutes was during the short recess indicated (at bottom of fol. 171). There was no other recess and the testimony was continuous up to the time the Court rendered its decision. The prosecutor cannot now enlarge the record by putting in any time for recess; short means short. If he can be permitted to enlarge the record then

I ask for permission to so enlarge it by offring an affidavit of the length of time of this "short" recess. After that decision, the appellant's counsel pointed out, that it was rendered immediately after the testimony closed. From the record, therefore, it is clear that the Trial Justice did not spend enough time reading these minutes in order to conclude that she "Misbehaved." The appellant states here that this violated her rights under the Fourteenth Amendment of the United States Constitution, although the appellant had adequate notice, she contends that the Trial Justice did not have such proper notice.

A case in point that seems to condemn this sort of proceeding in our system of justice is *Cook against the United States* (1925), 267 U. S. 157. In that case, it appeared that the United States District Judge had issued an attachment requiring the United States Marshal to produce petitioner "instanter" before the Court, to show cause why he should not be punished for having written a contemptuous letter to the Judge. The petitioner was produced and the Judge sentenced him to prison. Chief Justice Taft acknowledged that the Justices of the Supreme Court all agree that the letter was contemptuous (see p. 534). Nevertheless, conviction was unanimously reversed because of the ARBITRARY (italic mine) procedure adopted by the District Court. After deciding the contempt was not one commited in open court, in which case a more summary procedure might have been justified, the Chief Justice wrote as follows (at pp. 536, 537).

"When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of

the accused to present his defense, by witnesses and arguments. The exact form of the procedure and the prosecution of such contempts is not important."

The Court in RE SAVIN, 31 U. S. 267, applied this rule to proceedings for contempt.

"Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges***."

If the accused is to be advised of the charges certainly the Judge making the decision should carefully study the evidence before making an arbitrary finding. The same applies to proceeding in the State Court.

INRE OLIVER, 1948
(333 U. S. 257)

AS TO POINT III.

In any event, the appellant did nothing wrong and was jailed for no reason, which violated her rights under Amendment IV, V, VI, VIII and XIV of the United States Constitution.

Respectfully submitted,

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Exhibit A

EXTRAORDINARY SPECIAL AND TRIAL TERM
SUPREME COURT
STATE OF NEW YORK — ONEIDA COUNTY

IN THE MATTER

of

The Application of ROBERT E. FISCHER, Special Assistant Attorney General, for an Order revoking and/or modifying, etc., the sentence of HELEN DAVIS, also known as MAE THOMAS CRASKA, of July 14, 1959, in accordance with Sections 470-a and 935 of the Code of Criminal Procedure.

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

HELEN CRASKA, also known as HELEN DAVIS,

Defendant-Appellant.

JUDGMENT

The defendant above named, having appealed to the Appellate Division, Supreme Court of the State of New York, in and for the Fourth Judicial Department from the Order entered in this action on the 14th day of April, 1960, in the office of the Clerk of Oneida County and the appeal having been argued at a term of the Appellate Division of the Supreme Court of the State of New York, Fourth Department, held at Rochester, New York, on the 20th day of October, 1960, and an Order of said Appellate Division having been made and entered affirming the said Order,

Now, on motion of Louis J. Lefkowitz, by Robert E. Fischer, Special Assistant Attorney General, appearing for the Respondent People of the State of New York;

It is hereby ADJUDGED that the said order be and the same hereby is affirmed in all things.

Judgment Roll Filed; and Judgment Signed, Entered and Docketed, this 8th day of December, 1960, at 11:55 A. M.

Edwin L. Slusarczyk,
Clerk

Jane J. Smith, Sp. Dep.

Edwin L. Slusarczyk
Clerk.

STATE OF NEW YORK,

Oneida County Clerk's Office

ss.:

I, EDWIN L. SLUSARCZYK, Clerk of said County and of the Supreme and Court Courts therein, the same being Courts of Record, DO HEREBY CERTIFY, That I have compared the annexed copy of Judgment with the original record thereof on file in this office and that the same is a correct transcript therefrom, and of the whole of said original.

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed the seal of said County and Courts, at the City of Utica, this 8th day of December, 1960.

Edwin L. Slusarczyk, Clerk

Jane J. Smith,, Sp. Deputy Clerk.

Exhibit B

STATE OF NEW YORK — COURT OF APPEALS

Before: Hon. Stanley H. Fuld, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

HELEN CRASKA, also known as Helen Davis,
Appellant.

Certificate
Denying
Leave

I, STANLEY H. FULD, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to §520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York,

December 30, 1960

Stanley H. Fuld,
Associate Judge

Exhibit C

STATE OF NEW YORK — COURT OF APPEALS

Before: Hon. Stanley H. Fuld, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

HELEN CRASKA, also known as Helen Davis,

Appellant.

An application having heretofore been made herein for a certificate pursuant to §520 of the Code of Criminal Procedure permitting an appeal to the Court of Appeals and on December 30, 1960, said application having been denied and upon that application the defendant having argued that in the record and proceedings below there were violations of rights guaranteed by the United States Constitution and thereafter

An application for a stay having been made in order to allow the defendant an opportunity to apply to the Supreme Court of the United States of a Justice thereof for a further stay and to take such other steps as he may deem necessary in connection with defendant's appeal to that court, and now having heard Anthony J. FFernicola, Esq.,, in support of the application, and Maxwell B. Spoont, Esq., in opposition thereto, it is

ORDERED, that the application be and the same hereby is granted to the extent only that all proceedings to enforce the amended judgment of conviction herein be ad they hereby are stayed util January 16, 1961, and it is

FURTHER ORDERED, that bail as presently fixed be continued.

Dated at Albany

January 5, 1961

Stanley H. Fuld,

Associate Judge.

Exhibit D

Section 470-a CODE OF CRIMINAL PROCEDURE OF THE STATE OF NEW YORK.

Suspension of sentence; suspension of execution of judgment.

If after a plea or verdict of guilty or after a verdict against the defendent upon a plea of former conviction or acquittal, sentence shall have been suspended, the court may impose any sentence or make any commitment which might have been imposed or made at the time of conviction. If sentence shall have been imposed and execution of judgment suspended, the court may revoke the order suspending execution of judgment and order executed the judgment suspended or may modify the judgment so as to provide for the imposition of any punishment which might have been imposed at the time of conviction. The court may impose sentence or order judgment executed with or without modification as hereinabove provided at any time after such suspension of execution of judgment within the longest period for which the defendant might have been sentenced or, if the defendant is on probation and the period of probation exceeds the period for which the defendant might have been sentenced, at any time, while the defendant remains on probation; but not after the expiration of such period or periods, unless the defendant shall have ben convicted of another crime committed during such period. Provided, however, that the imprisonment directed by the judgment shall not be suspended or interrupted after such imprisonment shall have commenced.

(McKinney's Consolidated Laws of New York,
Volume 66, Part 2.)

Exhibit E

Section 935. CODE OF CRIMINAL PROCEDURE OF THE STATE OF NEW YORK.

Violation; revocation; modification; continuation

Whenever within the period of probation any probationer shall violate his probation, the court may issue a warrant for his arrest and may commit him with or without bail. On his being arraingned and after an opportunity to be heard the court may revoke, continue or modify his probation. If revoked, the court may impose any sentence it might have originally imposed.

(McKinney's Consolidated Laws of New York, Volume 66, Part 3.)

Exhibit F

Section 813-a. OF THE CODE OF CRIMINAL PROCEDURE OF THE STATE OF NEW YORK.

Ex parte order for interception, overhearing or recording

An ex parte order for the interception, overhearing or recording of telegraphic or telephonic communications may be issued by any justice of the supreme court or judge of a couty court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone number or telegraph line, and particularly describing the person or persons whose communications are to be intercepted, overheard or recorded and the purpose thereof. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than

two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for intercepting, overhearing or recording, or directing the interception, overhearing or recording of the telegraphic or telephonic communications transmitted over the instrument or instruments described. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same.

(McKinney's Consolidated Laws of New York,
Volume 66, Part 3.)

Exhibit G

Article 1. Section 12 New York State Constitution.

(Security against unreasonable searches, seizures and interceptions.)

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probablecause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. Adopted by Constitutional Convention of 1938; approved by the people November 8, 1938.

(McKinney's Consolidated Laws of New York,
Volume 2, Part 1.)

Exhibit H

UTICA, NEW YORK, JANUARY 30, 1961
REGISTERED NO. 73793
Value $ No Value Special Del'y fee $. . . . .
Fee $ .50 Ret. receipt fee $ .10
Surcharge $. . . . . Rest. del'y fee $. . . . . .
Postage $ .80 . . . . Airmail
Postmark
Postmaster, By T. S.

From Anthony J. Fernicola
1st National Bank Building
To U. S. Atty. for the Northern Dist. of N. Y.—Federal Bldg.
Syracuse, New York
January 30, 1961
POD Form 3806 — Dec. 1959 — 48—16—70493—4

United States Attorney,
for the Northern District
of New York
Federal Building
Syracuse, New York

Dear Sir:

Enclosed find a record used on appeal wherein there appears to be a violation of Sections 605 and 501 of the Federal Communications Act (Title 47).

I hand you this record as an officer of the court admitted to practice in the Federal Court for the Northern District of New York.

Ephebus J.

I call your attention, among other things, to the hearing of April 14th, 1960, commencing at page 34 and ending at page 110. In addition, I ask you to read the entire record.

Very truly yours,

Anthony J. Fernicola
AJF/ct
Encs.

Exhibit I

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United States Department of Justice

United States Attorney
Northern District of New York
Federal Building
Syracuse 1, N. Y.

January 31, 1961

Mr. Anthony J. Fernicola
Attorney at Law
First National Bank Building
Utica, New York

Dear Sir:

This will acknowledge receipt of your letter dated January 30, 1961 together with the Record on Appeal referred to therein. This has been referred to the Department of Justice for advice. In a very short time you will hear from me further.

Very truly yours,

TFB:DC

THEODORE F. BOWES
United States Attorney

FILE COPY

FILED
MAY 5 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

No. 877, October Term, 1960

In the Matter
of
The Application of ROBERT E. FISCHER, Special Assistant Attorney General, for an Order revoking and/or modifying, etc., the sentence of HELEN DAVIS, also known as MAE THOMAS CRASKA, of July 14, 1959, in accordance with Sections 470-a and 935 of the Code of Criminal Procedure.

PEOPLE OF THE STATE OF NEW YORK,
Appellee,

against

HELEN CRASKA, also known as HELEN DAVIS,
Defendant-Appellant.

ON APPEAL FROM THE FINAL ORDER OF AN ASSOCIATE JUDGE OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York

By ROBERT E. FISCHER
Special Assistant Attorney General
Counsel for Appellee
21 Hopper Street
Utica, New York

DAILY PRESS, INC., PRINTERS
UTICA, N. Y.

IN THE

Supreme Court of the United States

No. 877, October Term, 1960

In the Matter
of
The Application of ROBERT E. FISCHER, Special Assistant Attorney General, for an Order revoking and/or modifying, etc., the sentence of HELEN DAVIS, also known as MAE THOMAS CRASKA, of July 14, 1959, in accordance with Sections 470-a and 935 of the Code of Criminal Procedure.

PEOPLE OF THE STATE OF NEW YORK,
Appellee.

against

HELEN CRASKA, also known as HELEN DAVIS,
Defendant-Appellant.

MOTION TO DISMISS.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss the appeal in the above entitled case on the grounds that the appeal as a whole does not present substantial federal questions and two of the issues presented by way of appeal are not within the jurisdiction of the appellate processes of this Court, since not taken in conformity to statute.

Statement

This is an appeal from the final order dated December 30, 1960, of the Hon. Stanley H. Fuld, Associate Judge of the

Court of Appeals of the State of New York, denying appellant permission to appeal to that Court from the Order of the Appellate Division, Fourth Department, of the Supreme Court of the State of New York, entered December 1, 1960, unanimously affirming the order of the Extraordinary Special and Trial Term of the Supreme Court of the State of New York, which order revoked on April 14, 1960, a prior suspension of execution of sentence and imposed on appellant a sentence of one year to be served in the Oneida County Jail.

Appellant was indicted by a Grand Jury drawn for an Extraordinary Special and Trial Term of the Supreme Court of the State of New York for felonies and misdemeanors in connection with prostitution of women and the operation of a house of prostitution in the City of Utica, N. Y. and on July 14, 1959 was permitted to plead to one count of the indictment, a misdemeanor. Appellant was thereupon sentenced to:

> "Be committed to the Oneida County Jail for a term of one year, the execution of such sentence to be suspended during your good behavior. You are further fined the sum of $500.00 * * *."

The plea and sentence were founded upon a representation that defendant was then recovering from surgery.

Thereafter and on March 29, 1960, appellant appeared before a Grand Jury (then undertaking investigation of public corruption) pursuant to subpoena and was granted immunity by that Grand Jury under Section 2447 of the Penal Law of the State of New York. Appellant was examined concerning the means and method of escaping arrest for violation of the Penal Law in the operation of her house of prostitution during 1956 and 1957 and was again examined by the Grand Jury on March 31, 1960.

Thereafter and on April 5, 1960, appellant was served with an order of the New York State Justice presiding over the Grand Jury returnable April 8, 1960 requiring appellant to show cause why the suspension of execution of her sentence (by this same Court) should not be revoked and sentence executed pursuant to Section 470-a of the Code of Criminal Procedure.

The affidavit supporting the aforesaid Order to Show Cause alleged that appellant violated the "good behavior" condition of suspension of sentence by her conduct before the Grand Jury and had previously indicated her intention to tell the Grand Jury "nothing" in an intercepted telephone communication undertaken subsequent to being subpoenaed and before her appearance before the Grand Jury.

At the request of present counsel for appellant the hearing was adjourned for six days and on the adjourned date counsel requested particulars of the charges and contents of the Grand Jury Minutes, all of which were promptly furnished as requested prior to the conduct of the hearing.

The Minutes of the Grand Jury and the intercepted telephone conversation was properly identified, offered and received in evidence through witnesses subjected to cross examination. The appellant did not testify or offer any evidence in her own behalf. After hearing the testimony, reviewing the Grand Jury proceedings of March 29, 1960, and hearing argument from counsel for the People and the appellant, the Court:

> "Revoked the suspension of execution of sentence, which was ordered on July 14, 1959, and thereupon the sentence of the Court in your case is that you be committed to the Oneida County Jail for a term of one year."

The trial Court's findings included the improved health of the appellant and her statement regarding the same, and the conclusion of the Court that appellant's conduct before the Grand Jury was

> "Clearly inconsistent and incredible on its face, palpably false and patently untruthful and evasive, indicative of what the court would consider bad behavior."

The trial Court thereafter analyzed the source of the findings in the appellant's Grand Jury testimony:

> "It would appear there was a clear refusal on your part to testify factually as to why—what the foundation was for your supposition that you were to have only two girls in the house that you were operating. It was clear that you would not identify neighbors, who from your testimony, it would appear were very well known to you from long acquaintanceship. It would appear incredible that you couldn't identify persons who arranged for and received substantial sums of money for political contributions or tickets, whatever you want to call it. And, in the light of your announced intent as revealed in the telephone conversation and in the light of the whole tenor, the whole tone, in addition to the specific matters which I have pointed out here, of your Grand Jury testimony, the Court finds that in its moral judgment, let's put it that way, that your behavior has not been good behavior from the standpoint of the obligations of any ordinary reasonable citizen * * *".

Subsequently, appeal was had to the Appellate Division of the Supreme Court of the State of New York (Fourth Judicial Department), and the decision and judgment below were unanimously affirmed without opinion on December 1, 1960.

Thereafter, application was made to the Hon. Stanley H. Fuld, Associate Judge of the Court of Appeals of the State of New York, for permission to appeal to that Court.

which application after adversary argument was denied on December 30, 1960.

On January 5, 1961, Judge Fuld granted a stay of execution of sentence until January 16, 1961, thereby permitting appellant to make application to this Court for further stay of execution. By memorandum dated January 16, 1961, Mr. Justice Harlan denied the application of appellant for a stay at that time. Execution of sentence thereafter commenced on January 23, 1961. On February 16, 1961 the Appellate Division, Fourth Department, of the Supreme Court of the State of New York unanimously denied a further motion by appellant for a temporary stay of execution of the amended judgment.

ARGUMENT

POINT I

The Supreme Court of the State of New York properly received evidence of an intercepted telephone communication of the appellant.

The issue here presented has been passed upon by the United States Supreme Court in many instances and such is not violative of the United States Constitution.

Pugach v. *Dollinger*, 81 S. Ct. 650 (1961);
Olmstead v. *The United States*, 277 U. S. 438 (1928);
Schwartz v. *Texas*, 344 U. S. 199 (1952).

In addition, the declaration of the intent of appellant in her telephone conversation to tell the Grand Jury "nothing" provided only supplementary proof of "bad behavior."

POINT II

The hearing of August 14, 1960 did not violate appellant's rights under Amendment XIV of the United States Constitution.

The hearing at the trial level was conducted on notice, with a six-day adjournment to provide opportunity for preparation of counsel. Witnesses were presented and subjected to cross examination. The appellant was given full opportunity to be heard personally and by counsel. The analysis of the Grand Jury testimony by an experienced trial justice, as recited above, together with the various and lengthy analyses as made by both counsel during the hearing can only indicate that the Court's findings and decision were the result of careful and responsible consideration.

POINT III

The appellant's rights provided by Amendments IV, V, VI, VIII and XIV of the Constitution of the United States were not violated.

Although notice to the appellant and formal hearing were not required under New York statutes because of suspension of sentence (as distinguished from probation), the foregoing proceedings were undertaken as though appellant was a "probationer" to avoid any subsequent claim of lack of due process and proper hearing. The applicable portion of the New York Code of Criminal Procedure concerning suspension of execution of sentence follows:

470-a. *Suspension of sentence; suspension of execution of judgment.*

"* * * If sentence shall have been imposed and execution of the judgment suspended, the court may revoke the order suspending execution of judgment and order executed the judgment suspended or may modify the judgment so as to provide for the imposition of any punishment which might have been imposed at the time of conviction. The court may impose sentence or order judgment executed with or without modification as hereinabove provided at any time after such suspension of sentence or suspension of execution of judgment within the longest period for which the defendant might have been sentenced or, if the defendant is on probation and the period of probation exceeds the period for which the defendant might have been sentenced at any time while the defendant remains on probation; * * *"

When formal "probation" is ordered after sentence, the probationer is entitled to a hearing:

935. *Violation; revocation; modification; continuation.*

"Whenever within the period of probation any probationer shall violate his probation, the court may issue a warrant for his arrest and may commit him with or without bail. On his being arraigned and after an opportunity to be heard the court may revoke, continue or modify his probation. If revoked, the court may impose any sentence it might have originally imposed."

Those statutes permit the imposition of sentence previously suspended by the sentencing Court, in that Court's discretion and during the period of the suspension. Although the Courts of New York have concluded that notice and hearing are unnecessary for the exercise of discretion by the sentencing Court under the conditions here existing. *Ex Parte Kuney*, 5 N. Y. S. 2d 644, (Supreme Court, Special Term, New York County, 1938) aff'd Mem. 9 N. Y. S. 2d 403, aff'd Mem. 280 N. Y. 794; *People ex rel. Pascal* v.

Trombly, 173 App. Div. 497, 160 N. Y. S. 67 (Third Dep't 1916); *People* v. *Ottaway*, 247 N. Y. 493 (1928); *People* v. *Oskroba*, 305 N. Y. 113 (1953), the proceeding was here undertaken with all the formalities of trial, with adequate and timely review afforded. See also, *Burns* v. *United States*, 287 U. S. 216 quoted extensively in *Ex Parte Kuney*, *supra*; 5 N. Y. S. 2d at 644.

POINT IV

No substantial federal question has been raised.

The constitutionality of the statutes under which the sentencing Court was given discretion to revoke and modify its original sentence, *supra*, were not raised below or on appeal. Nor has issue been raised as to the adequacy of the notice and conduct of the hearing afforded. The sole substantial questions raised below and on appeal concerned the alleged "haste" with which the trial justice reached his decision, and the alleged misdirection of the discretion of the trial justice afforded him under the statutes of the State of New York.

The only other issue raised below concerned the impropriety of the receipt in evidence, at the hearing, of the intercepted telephone communication of the appellant.

(See Point I, *Supra*).

POINT V

The appellant's appeal is without merit.

This Court does not have jurisdiction to review the issues noted in Points II and III, *supra*, here presented by Notice of Appeal, the validity of those statutes of the State of

New York not having been raised below (28 U. S. C. 1257(2)).

CONCLUSION

It is respectfully submitted that the appeal should be dismissed for want of substantial federal questions and for lack of jurisdiction of this Court on appeal.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the State
of New York

By Robert E. Fischer
Special Assistant Attorney General
In Charge
Counsel for Appellee
21 Hopper Street
Utica, New York

Maxwell B. Spocnt
Of Counsel